(3)

No. 94-139

Supreme Court, U.S.
FILED
OCT 4 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

GENERAL MOTORS CORPORATION,

Petitioner,

v.

LINDA JACKSON, individually and as next friend and natural guardian of her minor daughter, AMANDA JACKSON, and TERRY JACKSON,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Mississippi

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

DAVID M. HEILBRON
JOHN R. REESE*
ROBERT A. BRUNDAGE
Three Embarcadero Center
San Francisco, California 94111
Telephone: (415) 393-2000

W. SWAN YERGER
GENE D. BERRY
Post Office Box 23040
Jackson, Mississippi 39225

KENNETH W. STARR
PAUL T. CAPPUCCIO
655 Fifteenth Street, N.W.
Washington, DC 20005

Attorneys for Petitioner General Motors Corporation

*Counsel of Record

McCUTCHEN, DOYLE, BROWN & ENERSEN
HEIDELBERG & WOODLIFF
KIRKLAND & ELLIS
Of Counsel

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

14 pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. THIS COURT HAS JURISDICTION 2

II. THIS CASE PRESENTS IMPORTANT FEDERAL ISSUES REQUIRING THIS COURT'S ATTENTION 5

III. GENERAL MOTORS DID NOT RECEIVE MEANINGFUL REVIEW IN THE MISSISSIPPI SUPREME COURT 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Bishop Leonard Reg. Catholic Sch. v. Unemployment Comp. Bd. of Review, 593 A.2d 28 (Pa. Cmwlth.), *app. denied*, 600 A.2d 540 (Pa. 1991), *cert. denied*, 112 S. Ct. 1671 (1992) 6

Boykin v. Alabama, 395 U.S. 238 (1969) 3

Boykin v. State, 207 So. 2d 412 (Ala. 1968) 3

Cardinale v. Louisiana, 394 U.S. 437 (1969) 4

Childers v. Couey, 348 So. 2d 1349 (Ala. 1977) 6

Clemons v. Mississippi, 494 U.S. 738 (1990) 9

Cohen v. Cowles Media Co., 501 U.S. 663 (1991) 5

First United Bank of Poplarville v. Reid, 612 So. 2d 1131 (Miss. 1992) 3

Forsham v. Harris, 445 U.S. 169 (1980) 8

Honda Motor Co. v. Oberg, 114 S. Ct. 2331 (1994) 7

In re Terry D., 83 Cal. App. 3d 890 (1978) 6

Jenkins v. Georgia, 418 U.S. 153 (1974) 5

Ohio Bell Tel. Co. v. Pub. Util. Comm'n, 301 U.S. 292 (1937) 9

Pearce v. McDaniel, 251 So. 2d 110 (La. App.), *writ refused*, 253 So. 2d 68 (La. 1971) 6

People v. Pearson, 332 N.W.2d 574 (Mich. App. 1983) 6

People v. Wisslead, 446 N.E.2d 512 (Ill. 1983) 6

Picard v. Connor, 404 U.S. 270 (1971) 3

TABLE OF AUTHORITIES – Continued

Page

Sochor v. Florida, 112 S. Ct. 2114 (1992) 9

Sperry-New Holland v. Prestage, 617 So. 2d 248 (Miss. 1993) 2

State v. Jones, 873 P.2d 122 (Ida. 1994), *petition for cert. filed* July 29, 1994 6

Taylor v. Kentucky, 436 U.S. 478 (1978) 3

Vachon v. New Hampshire, 414 U.S. 478 (1974) 3

Wood v. Georgia, 450 U.S. 261 (1981) 3

TREATISE

F. Read and L. McGough, *Let Them Be Judged: The Judicial Integration of the Deep South* (1978) 6

OTHER AUTHORITY

Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 Stanford L. Rev. 817 (1994) 6

INTRODUCTION

Respondents do not dispute the basic requirements of due process asserted in the petition: judgments must be supported by sufficient evidence, and appellate review must come to grips with the central issues in the case. Here, General Motors[1] demonstrated that the evidence *refuted* respondents' claim, and seven of nine Mississippi Supreme Court justices agreed that the claim is contrary to the physical facts. But the court first affirmed without a word of explanation, and on rehearing failed even to mention this dispositive issue. That is literally lawless.

This Court has never addressed the requirements of due process in the context of a civil damages action – the very heart of civil justice. But the Court's repeated affirmations in other contexts that adjudications must accord with the law and evidence are meaningless if they can be evaded by

---

[1] General Motors Corporation amends its Rule 29.1 list of parents and subsidiaries, attached as Appendix E to General Motors' petition, to include the following subsidiaries:

Diavia Aire, S.A. (Italy)
Diavia S.r.l. (Italy)
ENCI S.A.R.L. (France)
Texton P.L.C. (United Kingdom)
General Motors GmbH & Co. OHG (Germany)
EDS Personal Communications Corporation (USA)
EDS-Scicon N.V. (Belgium)
Systems & Management S.p.A. (Italy)
Federal Computer Services Corporation (USA)
Japan Systems Company Limited (Japan)
Suburban Limited Liability Company (USA)
Opel Leasing Verwaltungs GmbH (Germany)
General International (U.K.) Limited (England)
REICAB Limitada (Portugal)
GM-Saab Communication GmbH (Switzerland)
IBC Vehicles (Distribution) Limited (United Kingdom)
Reinshagen Italia Srl (Italy)
Reinshagen Tournai S.A. (Belgium)
PT General Motors Buana Indonesia (Indonesia)

silence. The Court should grant certiorari to make clear that a decision in accordance with the law is not a matter of judicial grace, but an essential ingredient of due process – a court cannot deprive a litigant of $10 million based on a process that it "must know is rubbish." (App. D at 23) (Hawkins, C.J., dissenting)

ARGUMENT

I. THIS COURT HAS JURISDICTION

Respondents claim that the Mississippi Supreme Court's violation of General Motors' due process rights by refusing to consider the sufficiency of the evidence was not properly preserved. (Brief in Opp. at 9) They do not dispute that an issue is preserved for this Court's review if the violation of federal rights became apparent too late to be presented in state court. (Petition at 12 n.7) Instead they contend that General Motors should have cautioned the court *prophylactically* that refusing to address a properly presented, dispositive issue would violate due process. (Brief in Opp. at 9) But there are endless errors a court *could* make. There is no duty to caution against them until one suspects they may occur. Here, General Motors was entitled to assume that the Mississippi Supreme Court would address a meritorious, dispositive issue squarely before it. General Motors made its position known as soon as it had reason to know the court was refusing to do its job. No more was required.

Respondents' fallback position – that General Motors' petition for rehearing should have asserted a violation of due process (Brief in Opp. at 9) – is no stronger. The Mississippi Supreme Court's initial summary affirmance revealed nothing about the court's reasoning or what issues it considered; when it filed the petition for rehearing, General Motors could not know the court was simply refusing to address the central dispositive issue. Certainly, General Motors had no reason to suspect that most of the justices actually agreed the evidence did not support respondents' claim, since that would have required reversal under Mississippi law. *Sperry-New Holland v. Prestage*, 617 So. 2d 248, 252 (Miss. 1993) (If the facts

"point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, [we are] required to reverse and render.") (brackets in original) (citation omitted); *First United Bank of Poplarville v. Reid*, 612 So. 2d 1131, 1136 (Miss. 1992) (verdict must be reversed if evidence would not persuade re[illegible]able factfinder).

Respondents also contend that General Motors failed to preserve its contention that the due process clause forbade the Mississippi Supreme Court to affirm a judgment unsupported by the evidence. (Brief in Opp. at 8) But General Motors argued at every stage that the physical facts proved respondents' only theory impossible, and that the verdict must therefore be set aside. (*E.g.*, Appellant's Brief in Mississippi Supreme Court at 10-13; Petition for Rehearing at 3-5.) That General Motors did not previously specify federal due process as the source of this rule is of no moment; since the issue and rule of law are the same and only the source of the rule is different, the federal argument is preserved. In *Vachon v. New Hampshire*, 414 U.S. 478 (1974) (per curiam), appellant argued in state court that the evidence was insufficient under state law; federal due process was never mentioned. This Court found the federal due process violation preserved. In *Wood v. Georgia*, 450 U.S. 261, 265 n.5 (1981), respondent argued in state court that petitioners' attorneys had a state-law conflict of interest; the federal Constitution was never mentioned. This Court found the federal due process violation preserved. *In Boykin v. Alabama*, 395 U.S. 238, 241 & n.3 (1969), the state court considered under state law whether a guilty plea was knowingly and voluntarily entered; the federal Constitution was never mentioned. *See Boykin v. State*, 207 So. 2d 412, 414-15 (Ala. 1968). This Court found the federal due process violation preserved. *See also Taylor v. Kentucky*, 436 U.S. 478, 482 n.10 (1978) (argument that "fundamental principle[s] of fair play" required a jury instruction should have alerted judge to reliance on due process); *cf. Picard v. Connor*, 404 U.S. 270, 277-78 (1971) (where the "ultimate question for disposition . . . [is] the same despite variations in the legal theory", the issue is preserved) (dictum).

General Motors' argument put the impossibility of respondents' theory before the court, and the verdict had to be reversed if the theory was impossible. Adding federal due process as another source for the same rule would not have changed the legal standard or the result, and therefore there is no reason to require it.[2]

Finally, it is apparent that the Mississippi Supreme Court actually did consider and reject the due process contentions. Justice Smith, dissenting, stated flatly that the supreme court had "considered and discussed at length" a number of issues, including the fact that "there is no factual support for the verdict of the jury," and castigated the majority for refusing to address them. (See App. D at 62-63) (Smith, J., dissenting) The concurrence pointed also to the discrepancy between the facts and the verdict. (See App. D at 56) (Banks, J., concurring) Thus, though the majority opinion makes no mention of it, the record shows that the court was aware of the unrebutted evidence. Moreover, the dissenting Chief Justice stated that the supreme court "majority is unfair, and has blatantly denied due process of law," and concluded that the exclusion of Marcos's testimony and the oppressive deliberation conditions violated due process. (App. D at 16, 22, 23) (Hawkins, C.J., dissenting) When the dissent accused both the lower court and the majority itself of violating due process, the majority could not have avoided deciding the issue – although it did not meaningfully consider it. Since the record and logic

---

[2] The reasons behind the rule that a federal issue must have been "pressed or passed on" in state court were fully satisfied by General Motors' argument that the evidence was insufficient under Mississippi law. Since the federal and state issues are identical – could a rational juror have found for respondents? – the record is as fully developed as if the federal due-process label had been attached. Likewise, the state courts have already had the chance to consider and remedy General Motors' grievance. Finally, the Mississippi court had the same opportunity to rest its decision on another, adequate and independent ground as if the federal label had been attached to the sufficiency-of-evidence argument. *See Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) (enumerating purposes of pressed-or-passed-on rule).

both show that the supreme court actually (but silently) decided the due process issues, they are adequately preserved. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991) (issue actually considered by state supreme court was reviewable in this Court whether or not party raised it below); *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974) (same).

Respondents next contend that the Question Presented in General Motors' petition for certiorari – whether due process requires meaningful review of civil damage judgments (Petition at i) – does not "fairly encompass" whether due process requires reversal of a judgment that contravenes the evidence. (Brief in Opp. at 7, 8) But the two issues are inseparable: the Mississippi Supreme Court denied meaningful review here precisely *because* it affirmed this judgment knowing that it contravened the evidence.

Respondents also suggest that the fact that Mississippi law purports to require reversal of a factually unsupported verdict somehow means that the court's affirmance was merely an error of state law. (Brief in Opp. at 7-8) That is a non sequitur. Since both federal and state law forbid an unsupported verdict, the verdict here violates both.

II. THIS CASE PRESENTS IMPORTANT FEDERAL ISSUES REQUIRING THIS COURT'S ATTENTION

Respondents say the Mississippi Supreme Court's affirmance of a judgment it knew was based on fiction should not trouble this Court. First they point out that Mississippi's own law requires reversal of unfounded verdicts. (Brief in Opp. at 7-8, 8-9) We agree, and that is precisely why the proceedings below were a sham that demands correction. The court knew the law required reversal of an unfounded verdict, a majority of justices agreed the verdict contradicted the physical facts, yet the court affirmed without even addressing the issue. If that does not deny the due process right of meaningful review, what does?

Respondents also suggest that since the Mississippi Supreme Court's dogged refusal to address a properly presented, dispositive claim of error is not worthy of this Court's

attention because it is not an announced policy. (Brief in Opp. at 8, 9-10) But announced policy or not, deliberate flouting of the law violates due process.[3] Contrary to respondents' suggestion (Brief in Opp. at 10), it is also a recurrent problem.[4]

---

[3] And, adding insult to injury, the Mississippi court fined General Motors another million dollars for even *asking* it to obey the law. Petition at 7 n.5.

[4] *See, e.g., Bishop Leonard Reg. Catholic Sch. v. Unemployment Comp. Bd. of Review*, 593 A.2d 28, 35 (Pa. Cmwlth.) (Smith, J., dissenting) ("The majority completely ignores Claimant's argument . . . thus depriving Claimant of a meaningful review"), *app. denied*, 600 A.2d 540 (Pa. 1991), *cert. denied*, 112 S. Ct. 1671 (1992).

Beyond dispute, courts sometimes ignore law they dislike. *See, e.g.*, Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 Stanford L. Rev. 817, 818-20 & nn.4-8 (1994) (reviewing examples of defiance and disingenuous distinction of controlling decisions); F. Read and L. McGough, *Let Them Be Judged: The Judicial Integration of the Deep South* 293-303 (1978) (chronicling one trial judge's repeated defiance of appellate rulings in voting rights litigation); *Childers v. Couey*, 348 So. 2d 1349, 1353 (Ala. 1977) (Jones, J., dissenting) ("Where, as here, the majority holds contrary to clear and applicable precedent without expressly overruling that precedent or without acknowledging its existence and application, I am constrained and duty bound to speak out . . . . "); authorities cited in Petition at 13-14 n.8.

Also beyond dispute, result-driven courts sometimes ignore powerful arguments they cannot answer. *E.g., Pearce v. McDaniel*, 251 So. 2d 110, 111 (La. App.) (Culpepper, J., dissenting) ("The majority opinion ignores defendant's principal argument on appeal", though the dissent finds it dispositive), *writ refused*, 253 So. 2d 68 (La. 1971); *In re Terry D.*, 83 Cal. App. 3d 890, 901 (1978) (Reynoso, J., dissenting) ("I find [the] due process arguments which the appellant makes to be persuasive. The majority ignore that argument."); *People v. Wisslead*, 446 N.E.2d 512, 515 (Ill. 1983) (Simon, J., dissenting) ("The majority completely ignores the State's argument . . . ", though the dissent finds it dispositive); *People v. Pearson*, 332 N.W.2d 574, 576 (Mich. App. 1983) (McKenzie, J., dissenting) ("The majority ignores the foregoing argument, although it has been properly assigned as error . . . . "); *State v. Jones*, 873 P.2d 122, 141 (Ida. 1994) (Bistline, J., dissenting) ("[T]he majority ignores this extremely persuasive

That is precisely why General Motors seeks certiorari in this case.

Respondents also claim that given the demands on this Court's time, it should not review "in individual cases" whether there was any basis for a verdict upheld by a state court. (Brief in Opp. at 10) Again, we agree, but we do not ask the Court to review every such case. The Court should review *this* outrage to set some due process boundaries and to send a message in an important area – civil litigation – that the Court has not addressed. The Mississippi Supreme Court was so confident it had the last word and so unable to reconcile its result with the plain truth or the law that it did not bother to try. If due process does not require a court to obey the undisputed law, this Court should so announce. If, however, it does, a single grant of certiorari will send a powerful message that will not soon need to be repeated.

Respondents finally argue that this Court should not intervene because (they say) the Court will have difficulty articulating what a reviewing court must do or when the right to meaningful review is violated, and thus the Constitution should not require meaningful review. (Brief in Opp. at 10-11) The question of "what standard of review is constitutionally required" is indeed difficult, as this Court has recognized. *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2341 n.10 (1994) But this Court does not hide from difficult questions. Nor need the standard for whether review is meaningful reduce to "I know it when I see it." Previous cases yield benchmarks to indicate whether review is meaningful, including an obvious, unexplained discrepancy between the facts and the outcome, or the reviewing court's neglect of an element essential to the decision. (Petition at 23). A majority's utter silence on an argument that a dissenting judge finds dispositive and challenges the majority to address provides further evidence the majority is simply ignoring an argument it cannot answer. In any event, due process rarely provides

---

argument as though appellant had never advanced it."), *petition for cert. filed* July 29, 1994.

mechanical rules; "the evaluation of a calculus of relevant factors is nothing new to the law." *Forsham v. Harris,* 445 U.S. 169, 188 (1980) (Brennan, J., dissenting). Without establishing rigid requirements, this Court can establish the bedrock principle – due process will not tolerate an empty form – and create a floor below which process may not sink and still be due. That there will be debatable cases is no reason to tolerate the flagrant ones.

III. GENERAL MOTORS DID NOT RECEIVE MEANINGFUL REVIEW IN THE MISSISSIPPI SUPREME COURT

Respondents contend that General Motors received meaningful review in this case. (Brief in Opp. at 11) We can hardly believe our eyes. The court first refused to discuss any of General Motors' claims at all, affirming summarily. After General Motors petitioned for rehearing, the court produced what the Chief Justice called "rubbish" that failed even to discuss most of General Motors' assignments of error.[5] In addition to the three dissenters' demonstration that the verdict enjoyed "no factual support" and was "absolutely contrary to the laws of physics, the operation of natural physical forces, and common sense" (App. D at 62), four members of the *majority* concurred that "The physical evidence does not support Mrs. Jackson's version because there is no physical indication that the axle broke in her lane of travel prior to the vehicle flipping." (App. D at 56)[6] Nevertheless, the majority

---

[5] In addition to the failure to address sufficiency of the evidence, the heart of General Motors' contentions in this Court, a section of Chief Justice Hawkins' dissent labeled "The Silent Majority" catalogued ten other reversible errors that the majority refused to address. (App. D at 24-47)

[6] As explained in General Motors' petition, the concurrence's statement that the evidence did not support General Motors' version, because there was no gravel next to the road before the vehicle flipped, is contrary to the undisputed evidence that was before the Court. (Petition at 9 n.6) Even respondents did not make that argument.

opinion still refused to discuss this matter even though, under undisputed Mississippi law and the factual view of seven of nine justices, it required reversal. That is not meaningful review; it is an empty form.

As evidence that the court actually considered and in good faith rejected General Motors' challenge to the sufficiency of the evidence, respondents point only to the majority's pro forma statement that it had "carefully reviewed" the record and found that "General Motors' assignments of error are without merit." (App. D at 7-8) But given an obvious discrepancy between the record and a court's conclusion, a boilerplate statement is not "meaningful review". *See, e.g., Clemons v. Mississippi*, 494 U.S. 738, 753-54 (1990) (unsupported conclusion that error was harmless did not indicate adequate review when factual record pointed strongly the other way; only a "detailed explanation based on the record" could justify the conclusion); *Sochor v. Florida*, 112 S. Ct. 2114, 2123-24 (1992) (O'Connor, J., concurring) ("An appellate court's bald assertion . . . cannot substitute for a principled explanation of how the court reached that conclusion.") It is the quintessential "empty form" that due process does not tolerate. *Ohio Bell Tel. Co. v. Pub. Util. Comm'n*, 301 U.S. 292, 303 (1937). This Court should use this case to say so.

Finally respondents argue that the evidence was ambiguous, based on the same spurious contentions that the dissents below decisively refuted (App. D at 63-85) and even the majority refused to accept. (Brief in Opp. at 11-12) They want this Court to suspend its disbelief in the impossible in the same way that the Mississippi Supreme Court majority did. Put another way, they want this Court to say due process permits a $10 million judgment to rest on "gouges" and "indentations" in asphalt that wash away in the rain.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Mississippi Supreme Court.

Respectfully submitted,

DAVID M. HEILBRON
JOHN R. REESE*
ROBERT A. BRUNDAGE
McCUTCHEN, DOYLE, BROWN
& ENERSEN
Three Embarcadero Center
San Francisco, California 94111
Telephone: (415) 393-2000

W. SWAN YERGER
GENE D. BERRY
HEIDELBERG & WOODLIFF
Post Office Box 23040
Jackson, Mississippi 39225

KENNETH W. STARR
PAUL T. CAPPUCCIO
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, DC 20005

Attorneys for Petitioner
General Motors Corporation

*Counsel of Record

October 3, 1994